Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-549

In the Supreme Court of the United States

OCTOBER TERM, 1989

DONALD EUGENE STAGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a count charging that petitioner operated a continuing criminal enterprise, which tracked the language of the statute but did not set out the series of drug violations on which the charge was based, was defective even though the drug violations were set out in other counts in the indictment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Dunn v. *United States*, 284 U.S. 390 (1932)	6
Russell v. *United States*, 369 U.S. 749 (1962)	5-6
United States v. *Becton*, 751 F.2d 250 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985)	5
United States v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), cert. denied, 109 S. Ct. 3221 (1989)	5

Statutes and rule:

2 U.S.C. 192	6
18 U.S.C. 922(g)(1)	2
21 U.S.C. 841(a)(1)	5
21 U.S.C. 846	2
21 U.S.C. 848	2, 3
Fed. R. Crim. P. 7(c)(1)	6

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-549

DONALD EUGENE STAGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-C18) is reported at 881 F.2d 1527.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1989. The petition for a writ of certiorari was filed on October 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment filed in the United States District Court for the Eastern District of Oklahoma charged petitioner and five co-defendants with violations of federal drug, firearms,

and tax laws. Petitioner was charged with conspiracy to manufacture, possess, and distribute amphetamine, in violation of 21 U.S.C. 846 (Count 1); operation of a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 3); and possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 5). Following a jury trial, petitioner was convicted on all three counts. He was sentenced to concurrent terms of imprisonment of 20 years on Count 1, 35 years on Count 3, and five years on Count 5.

1. The evidence, the sufficiency of which is not disputed, showed that from 1985 to 1987 petitioner and co-defendant Charles Teafatiller manufactured and distributed large quantities of amphetamine in northern Oklahoma. They employed a number of individuals to assist them, including William Teafatiller, Charles's nephew, who testified on behalf of the government. William first served as a guard while other conspirators manufactured amphetamine. Petitioner subsequently taught William to "cook" amphetamine and hired other guards. On a number of occasions, William assisted petitioner and others in producing the drug. They normally produced 20 to 50 pounds of amphetamine at a time, and petitioner usually paid William $5,000 in cash for his services. On each occasion, William testified, petitioner took the amphetamine that had been produced in order to distribute it. Tr. 32-72.

David Bright testified that petitioner recruited him to join the conspiracy. After Bright had participated in a number of "cooks," he began to assist petitioner in distributing the amphetamine. Over a 15-month period, Bright bought about 350 pounds of amphetamine from petitioner for $10,000 to $12,000 a pound, and thus paid petitioner a total of about $4 million. Bright sold the amphetamine by the ounce after receiving it from petitioner. Tr. 260-281.

2. Count 1 of the indictment charged petitioner with conspiring to manufacture, possess, and distribute amphetamine, and it included details concerning the operation of the conspiracy. Count 3 charged that petitioner had operated a continuing criminal enterprise (CCE) in violation of 21 U.S.C. 848. The count first alleged that petitioner had "repeatedly violated Title 21, United States Code, Section 841(a)(1) and other provisions of Title 21, regarding amphetamine." Pet. App. A5. Tracking the language of 21 U.S.C. 848, Count 3 continued by alleging that the "violations were part of a continuing series of violations undertaken by defendant DONALD EUGENE STAGGS, in concert with at least five other persons with respect to whom DONALD EUGENE STAGGS occupied a position of organizer, * * * and from which the defendant DONALD EUGENE STAGGS obtained substantial income and resources." Superseding Indictment 9.

At trial petitioner moved to dismiss the CCE count, claiming that it was fatally defective because it failed to describe the predicate acts of misconduct that constituted the continuing series of violations. The trial judge denied the motion.

3. The court of appeals decided, sua sponte, to consider petitioner's challenge to the CCE count en banc. It subsequently issued an opinion affirming petitioner's conviction on that count, while a panel issued an opinion disposing of various other claims of error.[1]

The en banc court held that "a CCE indictment is sufficient where, as here, the CCE counts charge [the defendants] in the language of the statute, and the indictment additionally alleges at least three violations in another count or counts." Pet. App. A7. In reaching that conclusion, the court noted that the defendants "were not convicted of any

[1] The panel opinion is reported at 881 F.2d 1546 (1989). None of the issues decided by the panel are raised in the petition.

crimes other than those they were charged with, nor was there evidence introduced at trial other than that alleged in the indictment." *Id.* at A13. Since the indictment provided adequate notice of the charges against petitioner, the court concluded that "it would be both anomalous and hypertechnical to conclude that, even though the indictment provided such notice, the notice function was not served because of the failure to explicitly incorporate by reference count one, containing the charged violations." *Id.* at A8.[2]

Three of the ten judges dissented. Pet. App. C1-C18. While they did not dispute that the CCE count would be adequate if it had incorporated the other counts by reference, they considered it defective on account of its failure to do so.

ARGUMENT

1. Petitioner does not deny that the indictment, read in its entirety and in a commonsense fashion, provided adequate notice of the charges against him. Nor could he. The CCE count specifically stated that the enterprise petitioner operated had engaged in repeated violations of the laws governing the production and distribution of amphetamines. Other counts specified those violations. And, as the court of appeals noted (Pet. App. A13), no evidence was admitted relating to any crimes not charged in the indictment.[3]

---

[2] The court noted that it was equally divided on the question whether, in the absence of a count specifying the drug charges, the CCE count would be adequate. Five members of the court thought it would be adequate because it tracked the language of the statute. Pet. App. A7.

[3] Petitioner suggests (Pet. 5) that other prosecutors might attempt to prove the existence of a continuing criminal enterprise through evidence that does not relate to any charge specifically alleged in the indictment. But since the court of appeals did not decide whether that would be permissible (Pet. App. A7) and this case does not involve such facts, review of this case is not warranted on account of that concern.

Moreover, contrary to petitioner's suggestion (Pet. 5) and the thrust of the dissenting opinion, it is clear that the grand jury understood that it was charging petitioner with operating a continuing criminal enterprise that had engaged in the amphetamine violations specified elsewhere in the indictment. The CCE count, after all, stated that the enterprise had "repeatedly violated" Section 841(a)(1) and other laws governing amphetamines, while Count 1 charged petitioner with conspiring to violate Section 841(a)(1) and specified numerous overt acts performed in the course of the conspiracy.

Petitioner nevertheless contends that the CCE count is defective on account of the failure expressly to incorporate the other counts. But even if incorporation is required in cases such as this one, the failure to incorporate another count or counts by reference is, at most, harmless error if the failure does not result in any prejudice to the defendant, as the court found to be the case here.

2. The only courts of appeals to have considered the question presented have agreed with the court below, as the court of appeals stated. Pet. App. A7 (citing *United States* v. *Moya-Gomez*, 860 F.2d 706, 752 (7th Cir. 1988), cert. denied, 109 S. Ct. 3221 (1989), and *United States* v. *Becton*, 751 F.2d 250, 256-257 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985)). While other courts have stated in similar settings that counts in indictments should expressly incorporate other counts by reference, no court has reversed a CCE conviction because the CCE count in the indictment tracked the language of the statute but failed expressly to incorporate other counts. To the contrary, the courts in *Moya-Gomez* and *Becton* held that the entire indictment should be examined to determine whether the defendant had actual notice of the charges against him.

Petitioner contends (Pet. 7) that the decision below is in conflict with this Court's decisions in *Russell* v. *United*

States, 369 U.S. 749 (1962), and *Dunn* v. *United States*, 284 U.S. 390 (1932). There is no merit to that contention. *Russell* involved 2 U.S.C. 192, a statute that makes it a crime for anyone summoned before a congressional committee to refuse to answer "any question pertinent to the question under inquiry." Thus, to prepare a defense to a charge of refusing to answer it was essential to know what the "question under inquiry" was. The indictments, however, did not state the subject of the inquiry at issue. The Court reviewed the statements of the congressmen and committee staff with respect to the subject of the inquiry at issue and found "a completely confused and inconsistent account of what, if anything, that subject was." 369 U.S. at 768. The Court accordingly concluded that "[t]he vice of these indictments * * * is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, *i.e.*, that they failed to sufficently apprise the defendant 'of what he must be prepared to meet.' " *Id.* at 764. In this case, in contrast, there is no allegation that petitioner had inadequate notice of the charges against him.[4]

Dunn did not involve the sufficiency of an indictment. It dealt with the permissibility of inconsistent jury verdicts on separate counts. In that context, the Court stated that "[e]ach count in an indictment is regarded as if it were a separate indictment." 284 U.S. at 393. That statement surely has no application in the context of assessing the adequacy of an indictment, where it is agreed that counts may incorporate the allegations in other counts by reference. See Fed. R. Crim. P. 7(c)(1).

[4] In *Russell*, the Court also noted that it was possible that the defendants had been convicted "on the basis of facts not found by, and perhaps not even presented to, the grand jury." 369 U.S. at 770. In this case, in contrast, the grand jury found that petitioner had conspired to violate the amphetamine laws and had taken various overt acts in the course of that conspiracy, as Count 1 alleged.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
MERVYN HAMBURG
Attorney

DECEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989 — 262-203(00830)